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Kent McNeil

Osgoode Hall Law School of York University, kmcneil@osgoode.yorku.ca

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Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims

Kent McNeil

THE COLONIZATION OF North America by Europeans raised fundamental issues about the status and rights of the original inhabitants of this continent. Were the Indian and Inuit peoples sovereign nations, with territorial rights equivalent to those of the European sovereigns in the so-called Old World? Did they have rights to the soil on a par with those of landowners in Britain, France, or Spain? If they were sovereign nations with territorial or land rights, what impact did European colonization have on them?

Even today, these questions have not been completely resolved. In Canada, for example, as recently as 1997 the Supreme Court left open the question of whether the Indian and Inuit peoples have an inherent right of self-government that survived European colonization.¹ At the same time, the Court decided that those peoples do have a right of exclusive use and occupation of their traditional lands, if they can prove they were in exclusive occupation of them at the time of assertion of European sovereignty. This means that the question of when sovereignty was acquired can have profound contemporary significance for the Indian and Inuit peoples of Canada.²

In the United States, these issues were addressed by the Supreme Court in the 1820s and 1830s. However, the discussion in this article will show that these early decisions are often misinterpreted or ignored in the context of acquisition of European sovereignty. All too often, it is assumed that the European nations were able to acquire sovereignty over the territories of the Indian and Inuit nations without their consent, and without actually taking possession and establishing effective control. This article will challenge this assumption, and reassess the manner and time of acquisition of European sovereignty in North America, by focusing on the geographical region of the Northern Plains.

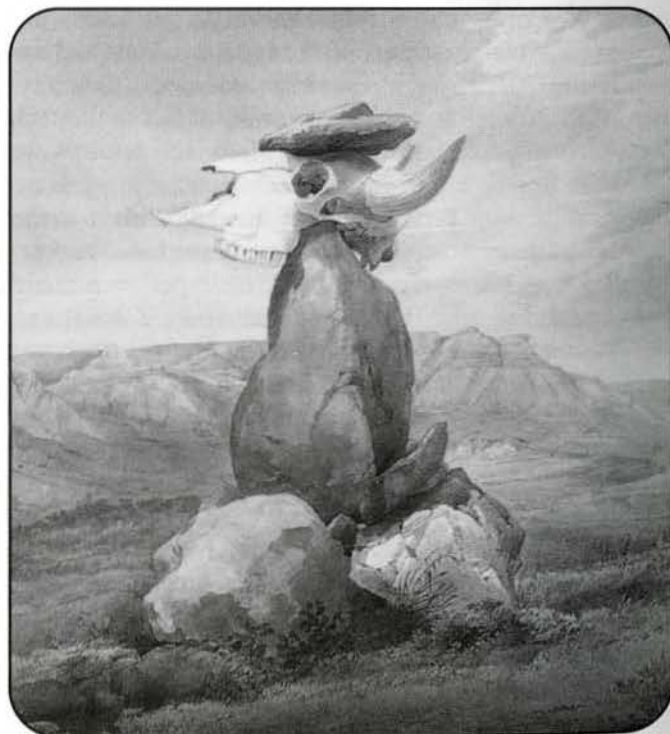
Acquisition of Sovereignty

It is first necessary to understand what sovereignty means. *Black's Law Dictionary* defines it in part as

[t]he supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; . . . the international

independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.³

The key element here appears to be the existence of a political society or state that is independent — that is, not subject to dictation by another political society or state. The actual form of the political organization or structure of that society or state is not a factor in determining whether it is sovereign — it could be a monarchy, as most European states were at the time of colonization of North America, or it could be an oligarchy, a theocracy, a democratic republic, and so on. Also, while in theory sovereignty is absolute, in reality every political society and state is subject to some outside influence. Moreover, sovereignty can be shared or divided, as it is in federal states like the United States and Canada.



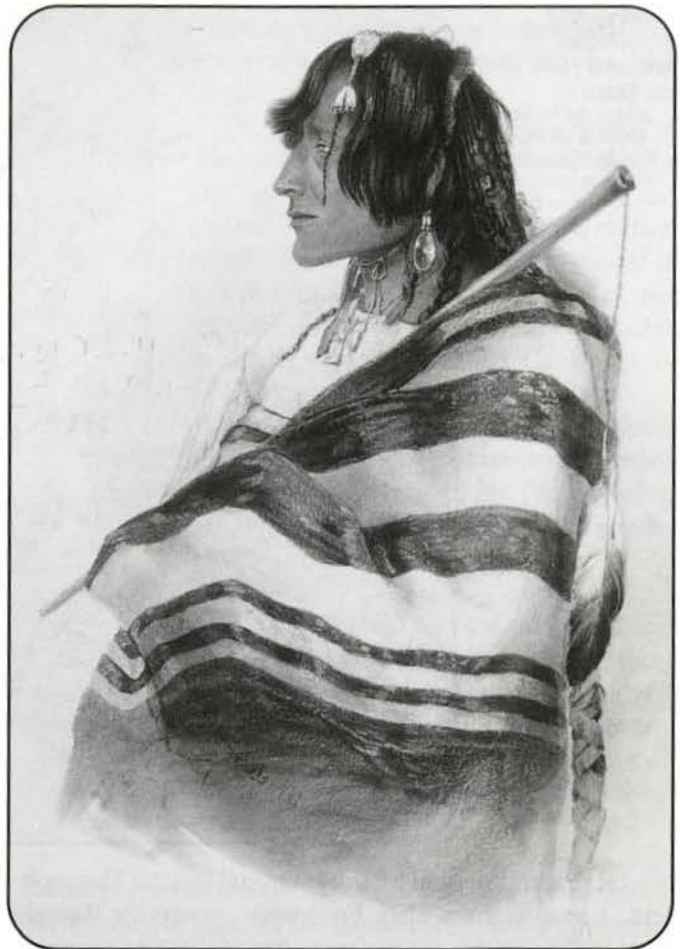
Karl Bodmer, *Assiniboin Medicine Sign*, 1833.
Joslyn Art Museum, Omaha, Nebraska: Gift of Enron Art Foundation

The definition in *Black* refers to "supreme political authority."⁴ But authority over what? Invariably, a sovereign exercises authority over a territory, *i.e.*, a defined area of the earth's surface, and the people within that territory. So in international law sovereignty entails what is known as "title to territory"; in fact, the two concepts are usually combined in the phrase "territorial sovereignty."⁵ However, sovereigns also assert jurisdiction in some contexts over persons who are outside their territory — for example, where a subject or citizen commits treason against the sovereign while in the territory of another sovereign. But as a general rule, sovereignty exists and is exercised in relation to a specific territory.

Sovereignty, in this sense, is a European concept, arising out of the development of the nation-state. So care needs to be taken in applying the concept in other parts of the world, where societies were not necessarily organized on the nation-state model, and where an equivalent conception of sovereignty may not have existed in the minds of the people. To avoid ethnocentrism, objective criteria are needed to determine whether a particular people were sovereign. The essential elements appear to be some form of political organization, a specific territory, and factual independence. Applying these criteria to the Indian and Inuit peoples in North America during the period of European colonization, it is clear that most, if not all, of them were sovereign.⁶ In fact, John Marshall, Chief Justice of the United States, admitted as much in 1832 in the famous case of *Worcester v. Georgia*, where he stated:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws.⁷

So if the Indian and Inuit nations were sovereign in the territories they occupied and controlled — which would have included most if not all of North America — how did the European nations acquire sovereignty here? At the time that this colonizing process was taking place, it was generally accepted among the colonizers that the means available for acquiring a given territory depended on whether or not the territory was already under the sovereignty of another nation. If it was, then the derivative modes of conquest or cession by international treaty were available. But if the territory lacked a sovereign, then the original mode of acquisition by discovery and taking possession was



Karl Bodmer, *Kiāsax, Piegan Blackfoot Man*, 1833.

Joslyn Art Museum, Omaha, Nebraska: Gift of Enron Art Foundation



Karl Bodmer, *Horse Racing of Sioux Indians near Fort Pierre*.

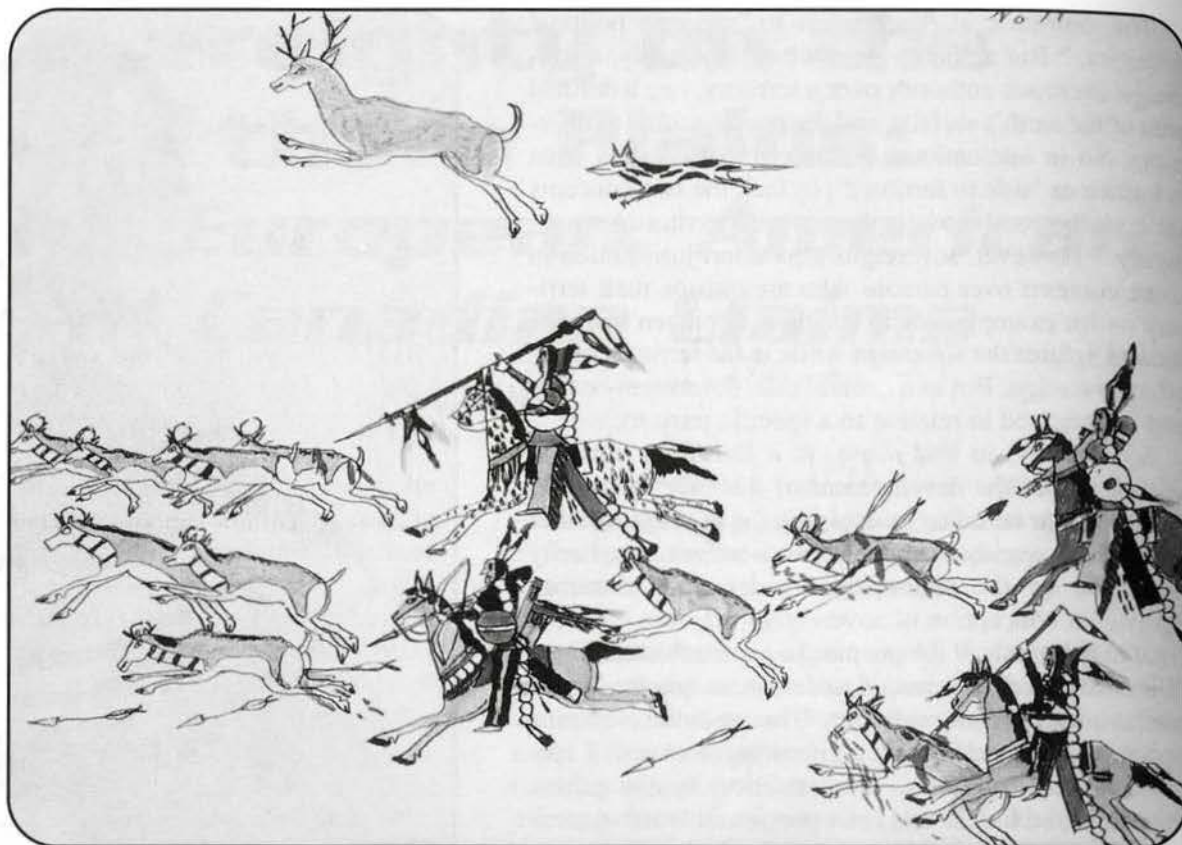
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available. In British colonial law, this was called settlement.⁸

Discovery followed by effective possession was no doubt an appropriate way of acquiring sovereignty over a territory that was truly vacant, or *terra nullius*, to use

Howling Wolf
(Cheyenne),
Antelope Hunt,
ca. 1880.

Joslyn Art Museum,
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Maish in memory of
Anna Bourke
Richardson



the Latin term favored by international jurists. The problem, however, was that Europeans generally thought they could acquire sovereignty over territories occupied by some non-European peoples — such as the Indian and Inuit peoples of North America — in this way as well. Underlying this view was a belief that these peoples were too “primitive” or “barbaric” to be accorded the status of sovereign nations. Europeans regarded themselves as superior — racially, culturally, theologically, politically — in short, Europeans were “civilized,” and the Indian and Inuit peoples were not.⁹

Since they did not think it necessary to employ the derivative modes of conquest and cession to acquire territorial sovereignty in North America, the Europeans relied on discovery. However, because they were generally incapable of effectively possessing the vast areas they tried to claim by discovery, they attempted to fortify their otherwise weak territorial claims by papal grants, symbolic acts of possession (such as placing crosses or plaques), and royal charters that purported to assert wide geographical jurisdiction. In the absence of effective occupation and control, however, other European nations did not take these pretentious and largely fictitious claims very seriously.¹⁰

In *Worcester v. Georgia*, Chief Justice Marshall had occasion to examine the effectiveness of these European claims to sovereignty in North America. Following his own earlier decision in *Johnson v. McIntosh*,¹¹ he accepted discovery as the appropriate means for assertion of European sovereignty on this continent. But he was obviously uncomfortable with this, as he had diffi-

culty reconciling it with the factual independence of the Indian nations, which he acknowledged. His misgivings are revealed in the following passage:

It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful *original* claims of dominion over the inhabitants of the other, or over the lands they occupied; or that *the discovery* of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.¹²

Referring to the European voyagers who made the so-called discoveries, he posed these questions:

Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?¹³

Marshall left these troubling questions unanswered, adopting instead a pragmatic approach. He wrote: “But power, war, conquest, give rights, which, *after possession*, are conceded by the world.”¹⁴ So it appears that, for him, discovery by itself was inadequate to give

George Catlin, *Archery of the Mandans*, 1844.

National Archives of Canada: C-028852

territorial sovereignty — for European title to territory to be complete, it had to be followed up by an actual taking of possession,¹⁵ which could be accomplished by war if necessary. This again followed his earlier decision in *Johnson v. McIntosh*, where he had already revealed himself as a pragmatist in this context. In that case, he stated:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.¹⁶

However, in *Johnson v. McIntosh* the Chief Justice had held that the inchoate title obtained by discovery did impair the rights of the Indian nations to some extent, as “their rights to complete sovereignty, as independent nations, were necessarily diminished.”¹⁷ This is where his thinking gets a little fuzzy, as how could the sovereignty of the Indian nations be diminished if the European colonial power had not yet completed its title to the territory by taking possession? What Marshall seems to have had in mind here was a transitional period, during which the European power had sufficient territorial sovereignty to exclude other European powers and take away the right of the Indian nations to deal with other Europeans. But the title

to territory still had to be consummated by possession for sovereignty to be complete.¹⁸

When he returned to this matter in *Worcester v. Georgia*, Marshall clarified that the doctrine of discovery really only applied among the European powers themselves and could not affect the rights of the Indian nations who were already in possession. After referring to the royal charters issued by the British Crown in the 17th century, which purported to convey title and jurisdiction to various individuals and companies over vast territories stretching from the Atlantic to the Pacific, which Britain supposedly claimed by discovery, he said:

The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them [*the charters*] to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.¹⁹

Later in his judgment, he concluded that “these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.”²⁰

Summing up, the doctrine of discovery, as articulated by Chief Justice Marshall, regulated the acquisition of sovereignty among the colonizing powers themselves. Its impact on the Indian nations in North America was limited to preventing European powers other than the discovering nation from entering into relations with them.²¹ But the Indian nations’ sovereignty and their

Alfred Jacob Miller, *Skirmishing: Crow Indians*, 1867.

National Archives of Canada: C-000412



[Assiniboin] Indian Camp, Manitoba, 1874. Photographer: Unknown.
National Archives of Canada: C-081793

right to the territories occupied by them were not affected until the discovering power actually acquired possession of those territories, either by taking them violently by conquest, or acquiring them peacefully by treaty.

Sovereignty on the Northern Plains

The Indian nations who inhabited the Northern Plains (roughly the prairie region north of the Platte River) were sovereign at the time the Europeans supposedly discovered the region and began to lay claim to it. However, the Indian territories were not static — on the contrary, it seems clear that some nations, such as the Cree, Ojibwa (or Chippewa), and Sioux, who were present on the Northern Plains and who signed treaties with the American and Canadian governments in the 19th century, lived further east in the 17th century.²²

The earliest European claims to the Northern Plains may have been made by Spaniards who came north from Mexico and New Mexico, apparently without ever penetrating the region.²³ Britain also asserted vague claims to the Northern Plains through royal charters such as the Virginia Charter of 1609, which purported to grant to the London Company all the territory within 200 miles north and south of Cape Comfort on the Atlantic Coast inland “from Sea to Sea, West and Northwest,”²⁴ and the Hudson’s Bay Company Charter of 1670, which purported to give the Company the whole of the Hudson watershed, a vast area including most of the territory now located in the prairie provinces of Canada, and reaching down into Minnesota and the Dakotas.²⁵ However, given that the Northern Plains were entirely unknown to Europeans at the time these charters were issued, these claims can hardly be taken seriously.²⁶ This is confirmed by the portions of Chief Justice Marshall’s

judgment in *Worcester v. Georgia* that were examined earlier.²⁷

Apart from Englishman Henry Kelsey’s adventurous trip from Hudson Bay in 1690-1692, which apparently took him to the northern edge of the Canadian prairies, French explorers and traders, traveling west from New France, were the first Europeans to reach the Northern Plains. Pierre Gaultier de La Vérendrye and his sons, Louis-Joseph and François, made their way onto the plains in what is now southern Manitoba in the 1730s and proceeded to lay claim to the region for France and set up fur trading posts. Their explorations took them south to the Mandan villages along the Missouri, and possibly as far west as the Black Hills.²⁸ By the 1750s, the French had established a

series of posts on the Canadian prairies, reaching at least to the junction of the North and South Saskatchewan rivers, in territory the British Crown had purported to convey to the Hudson’s Bay Company by charter in 1670.²⁹ However, while the French laid claim to this area as against the British, they regarded the Indians who lived in the Western interior of North America “as independent; they were neither French subjects nor bound by French law.”³⁰

Even earlier, in the 1670s and 1680s, French explorers, traders, and missionaries — men like Louis Jolliet, Jacques Marquette, and Robert Chevalier de La Salle — traveled overland to the Mississippi Valley and also made territorial claims for France.³¹ Trading posts, garrisons, and then towns were established, prominent among them New Orleans (founded in 1718 by Jean-Baptiste Le Moyne de Bienville).³² These explorations and settlements formed the basis for French claims to the territory known as Louisiana. However, while French traders and missionaries ventured onto the plains, sometimes following the Missouri River,³³ no attempt was made to bring the Indians of the Northern Plains under French jurisdiction.

Louisiana was ceded by France to Spain by a secret treaty in 1762 and transferred back to France by treaty in 1800. Significantly, neither of these treaties contained a description of the boundaries of the territory.³⁴ While it is apparent from the terms of the latter treaty that the extent of the territory in 1800 was the same as it had been in 1762,³⁵ the matter of the boundaries remained unclear.³⁶ Nor was this resolved when Thomas Jefferson purchased Louisiana from Napoleon in 1803. In the treaty giving effect to the purchase, France ceded to the United States “in full Sovereignty the said territory [of Louisiana] with all its rights and appurtenances as fully

and in the Same manner as they have been acquired by the French Republic [from Spain by the treaty of 1800]."³⁷ But although no description of the boundaries was included,³⁸ at the time Jefferson had a definite opinion about the extent of the territory the United States had acquired, which he expressed in a letter to John Breckinridge (U.S. Senator from Kentucky), dated August 21, 1803:

The boundaries, which I deem not admitting question, are the high lands on the western side of the Mississippi enclosing all its waters, the Missouri of course, and terminating in the line drawn from the northwestern point of the Lake of the Woods to the nearest source of the Mississippi, as lately settled between Great Britain and the United States.³⁹

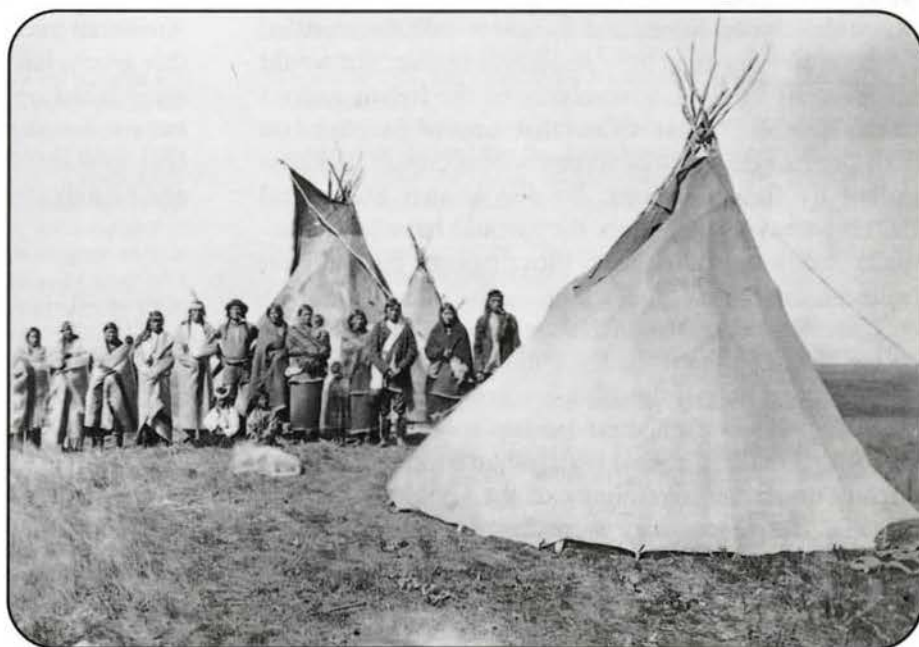
The settlement between Britain and the United States alluded to by Jefferson was the Treaty of Paris of 1783, which among other things had set the boundary between British North America and the United States, running in part from Lake Superior to "the most north-western point" of the Lake of the Woods, "and from thence on a due west course to the river Mississippi," and then down that river to the 31st degree of north latitude.⁴⁰ However, the drafters of that treaty made a geographical error, as the Mississippi River is entirely south of the Lake of the Woods.⁴¹ Consequently, the location of the British/United States boundary beyond the Lake of the Woods was as uncertain as the western and northern boundaries of Louisiana. As between Britain and the United States, this issue was resolved by a Convention in 1818 that extended the international boundary westward along the 49th parallel to the Rocky Mountains.⁴²

Now although France, Spain, Britain, and the United States purported to deal with the vast expanses of the Northern Plains by treaties among themselves in the period from 1762 to 1818, in reality they had scant knowledge of and absolutely no control over most of the region, especially prior to the Lewis and Clark expedition from 1804 to 1806.⁴³ The Indian nations of the Northern Plains — the Sioux, Mandan, Cheyenne, Crow, Blackfoot, Cree, and others — were the real masters of the country. There can be no doubt that they would have met the tests for sovereignty identified earlier, namely political organization, specific territory, and factual independence.⁴⁴

Johnson v. McIntosh and *Worcester v. Georgia* were decided in 1823

and 1832, not long after Jefferson purchased Louisiana and the United States and Britain purported to divide the Northern Plains between themselves. While those cases involved Indian nations east of the Mississippi — the Illinois and Piankeshaws, and the Cherokee — the general principles laid down by the Chief Justice were clearly intended to apply throughout North America. Marshall did not regard discovery as conferring territorial sovereignty on the discovering European power as against the Indian nations. Something more was required — there had to be an actual taking of possession, either by conquest or pursuant to an Indian treaty. Discovery did, however, give the discovering nation an inchoate territorial title as against other European powers. Presumably this incomplete title could be passed from one European power to another by means of an international treaty.

Leaving aside the question of how far the discovery of a coastline or a river extended into the unexplored hinterland, it would appear from Marshall's judgments that British voyages into Hudson Bay, and French explorations of the Mississippi River, would have given those European powers inchoate territorial title to those regions by discovery. To the extent that they were able to actually take possession and exercise effective control, they would have perfected that title and acquired territorial sovereignty. Re-examining the 1762 and 1800 treaties between France and Spain and the 1803 Louisiana purchase in light of this, it is apparent that those international agreements would only have transferred what the transferring power actually had, that is, territorial sovereignty over the area it actually possessed and controlled, and a right as against the other European powers to acquire more territory within the limits of the discovery. Until that happened, those agreements, like



Group of Dakota (Sioux) Indians at Turtle Mountain, Manitoba, 1873-1875. Photographers: Royal Engineers. National Archives of Canada: PA-074652

the earlier charters, would have been "blank paper so far as the rights of the natives were concerned."⁴⁵

Conclusion

In light of the above analysis of the decision in *Worcester v. Georgia* in particular, the effect of discovery, colonial charters, and inter-European and European-American treaties has to be reconsidered. As Marshall made clear, until followed up with effective possession and control, those acts and agreements would not confer sovereignty over the Indian and Inuit nations and their territories. Whatever understanding the European powers may have reached among themselves about the effect of discovery or the efficacy of colonial charters, that understanding could not bind Indian and Inuit nations in North America that were not members of the European club. Likewise, treaties between European powers purporting to distribute or delineate territorial claims could not limit or take away the sovereignty of Indian and Inuit nations that were not party to those agreements.

So on the Northern Plains, by the Louisiana Purchase the United States would have acquired sovereignty over the territory that France actually possessed and controlled in 1803, and a right *as against France and possibly the other European powers* to extend its sovereignty over the rest of the territory France had discovered — whatever its bounds might be. The 1818 Convention between the United States and Britain would have settled the boundary between their respective claims, but would not have affected the sovereignty of the Indian nations on the Northern Plains. Given that most of the plains on both sides of that new boundary was occupied and controlled by Indian nations, for the United States and Britain to have sovereignty they would have had to actually acquire territory from those nations by conquest or treaty.

This means that the Indian treaties that were signed on the Northern Plains by the United States and Canada in the second half of the 19th century need to be reconsidered.⁴⁶ All too often, these treaties are regarded as domestic agreements, signed with Indian nations who were already under the sovereignty of the United States and Canada. But unless they were in effective possession and control of the Northern Plains before the treaties were signed, the United States and Canada would not have had sovereignty there. In that case, those treaties would have international rather than domestic status, and might involve agreement that sovereignty would be



Blackfeet Migrating, ca. 1886. Photographer: Buell.

National Archives of Canada: PA-066536

shared.⁴⁷ The implications of such a re-assessment of the treaties could be far-reaching, especially in Canada where the Supreme Court has not yet acknowledged that the Indian nations retained internal sovereignty after the treaties were signed.

It may be surprising that issues as fundamental as the manner and time of acquisition of European sovereignty in North America, and the status of Indian treaties, are still open to question. One reason for this is that entrenched assumptions, which all too often are based on unfounded and biased attitudes toward the Indian and Inuit peoples, have gone unquestioned by mainstream American and Canadian society for so long. Hopefully this article has shown that these assumptions do not always stand up to examination and analysis. When that occurs, we should be prepared to discard them and accept explanations more in accord with legal principle and historical reality.

ACKNOWLEDGMENTS

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NOTES

1. See *Delgamuukw v. British Columbia* [1997], 3 S.C.R. 1010, discussed in Lori Ann Roness and Kent McNeil, "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts," *Journal of the West* (July 2000).
2. The Métis people of Canada also have land and self-government claims, but as they emerged as a distinct people after the arrival of the Europeans the principles applicable to their claims are different: see *R. v. Van der Peet* [1996], 2 S.C.R. 507, 558.
3. *Black's Law Dictionary*, 6th ed. (St. Paul, MN: West Publishing Co., 1990), 1396.

4. *Ibid.*
5. See Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford, UK: Clarendon Press, 1990), 107-126; J. G. Starke, *Introduction to International Law*, 10th ed. (London, UK: Butterworths, 1989), 157-170.
6. One needs to keep in mind as well that, during the period under consideration from the end of the 15th until well into the 19th century, much of Europe was not organized on the modern nation-state model. Indeed, Italy and Germany were only united into modern nation-states in the second half of the 19th century.
7. 6 Pet. 511 (1832), 542-543.
8. For discussion of these modes of acquisition of sovereignty in British colonial law, see Kent McNeil, *Common Law Aboriginal Title* (Oxford, UK: Clarendon Press, 1989), 108-133.
9. See Wilcomb E. Washburn, "The Moral and Legal Justifications for Dispossession of the Indian," in James Morton Smith, ed., *Seventeenth-Century America: Essays in Colonial History* (Chapel Hill: University of North Carolina Press, 1959), 15; Geoffrey S. Lester, "Primitivism versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land," in Carol Brice-Bennett, ed., *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador* (Ottawa, Ont.: Labrador Inuit Association, 1977), 351; Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).
10. See John T. Juricek, "English Territorial Claims in North America under Elizabeth and the Early Stuarts," *Terrae Incognitae*, 7 (1975):7; Brian Slattery, "French Claims in North America, 1500-1559," *Canadian Historical Review*, 59 (1978):139.
11. 8 Wheat. 543 (1823). See also *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831).
12. *Worcester v. Georgia*, 6 Pet. 515 (1832), 543 (emphasis added).
13. *Ibid.*
14. *Ibid.* (emphasis added).
15. On the inadequacy of discovery to give complete title to territory, Marshall C.J.'s views were in accord with those of early international law jurists, such as Francisco de Vitoria and Hugo Grotius; see S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), 11-12.
16. 8 Wheat. 543 (1823), 591.
17. *Ibid.*, 574.
18. See *ibid.*, 573, where he wrote: "This principle [which the European powers agreed upon, to regulate the acquisition of American colonies as amongst themselves] was that discovery gave title to the government by whose subjects, or by whose authority, it was made, as against all other European governments, which title might be consummated by possession" (emphasis added). This passage was quoted and relied on by the Chief Justice in *Worcester v. Georgia*, 6 Pet. 515 (1832), 543-544.
19. *Worcester v. Georgia*, 6 Pet. 515 (1832), 544-545.
20. *Ibid.*, 546. For a British colonial law perspective on the efficacy of Royal Charters, see *Staples v. R.* (1899, unreported), where the Judicial Committee of the Privy Council (the highest court of appeal in the British Empire) decided that the British South Africa Company Charter could not, of itself, give the Crown territorial sovereignty over Matabeleland (Southern Rhodesia). In the course of the proceedings, the Lord Chancellor commented that the charter could not "give jurisdiction of sovereignty over a place Her Majesty has no authority in": as quoted and discussed in Kent McNeil, "Aboriginal Nations and Québec's Boundaries: Canada Couldn't Give What It Didn't Have," in Daniel Drache and Roberto Perin, eds., *Negotiating with a Sovereign Québec*, 107 (Toronto, Ont.: Lorimer, 1992), 116. The proceedings in *Staples* are printed in Stephen Allan Scott, "The Prerogative of the Crown in External Affairs and Constituent Authority in a Constitutional Monarchy," D.Ph. thesis, Oxford University, 1968, App. I.
21. In *Worcester v. Georgia*, 6 Pet. 515 (1832), 544, Marshall C.J. said that discovery "was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell" (emphasis added).
22. See David G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina, Sask.: Canadian Plains Research Center, University of Regina, 1979), 15-49; Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985), 40; John S. Molloy, *The Plains Cree: Trade Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988), x, 5-20; Laura Peers, *The Ojibwa of Western Canada, 1780 to 1870* (Winnipeg: University of Manitoba Press, 1994), 3-7; Leo Pettipas, *Aboriginal Migrations: A History of Movements in Southern Manitoba* (Winnipeg: Manitoba Museum of Man and Nature, 1996); Richard White, "The Winning of the West: The Expansion of the Western Sioux in the Eighteenth and Nineteenth Centuries," in John R. Wunder, ed., *Native American Law and Colonialism, Before 1776 to 1903* (New York: Garland Publishing, 1996), 169.
23. See Warren A. Beck and Ynez D. Haase, *Historical Atlas of the American West* (Norman: University of Oklahoma Press, 1989), maps 15-19.
24. Quoted from Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of . . . the United States of America*, vol. 7 (Washington, D.C.: GPO, 1909): 3795.
25. The Hudson's Bay Company Charter is reproduced in E.E. Rich, ed., *Minutes of the Hudson's Bay Company, 1671-1674* (Toronto, Ont.: The Champlain Society, 1942), 131-148. For maps of the areas supposedly covered by geographical descriptions in this and the Virginia Charter, see Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982), 64-65.
26. See Justin Winsor, *The Mississippi Basin: The Struggle in America Between England and France, 1697-1763* (1895; Freeport, NY: Books for Libraries Press, 1972), 3-4.
27. See also the record of the *Ontario Boundaries Case* (1884, unreported), decided by the Judicial Committee of the Privy Council, in *The Proceedings before . . . the Privy Council . . . Respecting the Westerly Boundary of Ontario* (Toronto, Ont.: Warwick and Sons, 1889), and discussion of that case in McNeil, *supra* note 25, 26-33. It appears to have been the opinion of the Privy Council in that case that Hudson's Bay Company charter was only effective to give the Company a right to the lands draining into Hudson Bay to the extent, in the words of the Lord Chancellor, that "they were able to make themselves masters of the country": *The Proceedings*, 362, quoted in McNeil, 29. See also *Staples v. R.*, *supra* note 20.
28. See Winsor, *supra* note 26, 194-204; Beck and Haase, *supra* note 23, map 17; R. Cole Harris, ed., *Historical Atlas of Canada*, vol. 1 (Toronto, Ont.: University of Toronto Press, 1987); "Inland Expansion," 88, and Plate 36 by Richard I. Ruggles and Conrad E. Heidenreich.
29. In the *Ontario Boundaries Case*, *supra* note 27, the Privy Council apparently decided that this French presence was sufficient to cut off the territorial claims of the Company at the English River north of the Lake of the Woods: see discussion in McNeil, *supra* note 25, 26-33.
30. Harris, *supra* note 28, "Inland Expansion," 89. See also J.W. Eccles, "Sovereignty-Association, 1500-1783," *Canadian Historical Review*, 65 (1984):475; Cornelius Jaenen, "French Sovereignty and Native Nationhood During the French Régime," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto, Ont.: University of Toronto Press, 1991), 19; compare Morris S. Arnold, "Cultural Imperialism and the Legal System: The Application of European Law to Indians in Colonial Louisiana," *Loyola Law Review*, 42 (1997):727.
31. See Harris, *supra* note 28, Plate 36 by Richard I. Ruggles and Conrad E. Heidenreich.
32. See Winsor, *supra* note 26.
33. E.g., Etienne de Vénard de Bourgmond (1714) and Claude-Charles Dutisné (1719); see biographical articles by Louise Dechêne and C.J. Russ, in *Dictionary of Canadian Biography*, vol. 2 (Toronto, Ont.: University of Toronto Press, 1969), 645, 215, respectively.
34. The texts of these treaties are in Frances Gardiner Davenport and Charles Oscar Paullin, eds., *European Treaties Bearing on the*

- History of the United States and Its Dependencies*, vol. 4 (Gloucester, MA: Peter Smith, 1967), 91, 181. The 1762 treaty simply ceded "all the country known by the name of Louisiana, as well as New Orleans and the island on which this town is situated"; the 1800 treaty returned to France "the colony or province of Louisiana with the same extent that it presently has in the hands of Spain, and that it had when France possessed it" (author's translations of the original French text).
35. See *supra* note 34.
 36. See Thomas Maitland Marshall, *A History of the Western Boundary of the Louisiana Purchase, 1819-1841* (Berkeley: University of California Press, 1914), 2, 4-5.
 37. Treaty for the Cession of Louisiana between France and the United States, signed at Paris, 30 April 1803, Art. I, in Clive Parry, ed., *The Consolidated Treaty Series*, vol. 57 (Dobbs Ferry, NY: Oceana Publications, 1969-1981), 31. The treaty went on to provide in Art. II that the cession included adjacent islands belonging to Louisiana, vacant lands, public buildings, fortifications, and so on.
 38. See Marshall, *supra* note 36, 8, where it is stated that Robert Livingston and James Monroe, the American ministers who negotiated the purchase in Paris, attempted to have boundaries defined more definitely, but were unsuccessful.
 39. In Merrill D. Peterson, *The Portable Thomas Jefferson* (New York: Penguin Books, 1977), 495. In the same letter Jefferson acknowledged that Spain had claims along the Gulf Coast that might conflict with American claims, while expressing confidence that these would be resolved in favor of the United States through diplomatic pressure and negotiations. But as our focus is on the Northern Plains, the location of the southwestern boundary of Louisiana need not concern us. See also Jefferson's letter to Meriwether Lewis, dated 16 November 1803, in Donald Jackson, ed., *Letters of the Lewis and Clark Expedition, with Related Documents: 1783-1854*, 2nd ed., vol. 1 (Urbana: University of Illinois Press, 1978), 136-138, and further references and discussion in Marshall, *supra* note 36, 10-14, where it is observed that Jefferson's conception of the extent of Louisiana "gradually expanded until it included West Florida, Texas, and the Oregon country, a view which was to be the basis of a large part of American diplomacy for nearly half a century" (p. 14, and see maps between pp. 10 and 11).
 40. Definitive Treaty of Peace Between Great Britain and the United States, signed at Paris, 3 September 1783, Art. II, in Parry, *supra* note 37, vol. 48, 491-492.
 41. See Norman L. Nicholson, *The Boundaries of the Canadian Confederation* (Toronto, Ont.: Macmillan of Canada, 1979), 40-41.
 42. Convention of Commerce Between Great Britain and the United States, signed at London, 20 October 1818, Art. II, in Parry, *supra* note 37, vol. 69, 295. This boundary was later extended to the Pacific Coast by the 1846 Oregon Treaty and subsequently became the American-Canadian border. See Nicholson, *supra* note 41, 41-42, 45-47, 67-68 (maps).
 43. As is well known, the purpose of that expedition was precisely to gather information on the Missouri country, and to find a practical route from there to the Pacific Ocean: see President Jefferson's Instructions to Captain Lewis, 20 June 1803, in Peterson, *supra* note 39, 308-315. See also Bernard DeVoto, ed., *The Journals of Lewis and Clark* (Boston, MA: Houghton Mifflin Co., 1953); James P. Rhonda, *Lewis and Clark Among the Indians* (Lincoln: University of Nebraska Press, 1984); Stephen E. Ambrose, *Undaunted Courage: Meriwether Lewis, Thomas Jefferson, and the Opening of the American West* (New York: Simon and Schuster, 1996).
 44. See White, *supra* note 22, discussing the increasing dominance of the Sioux in the 18th and 19th centuries and pointing out that neutral or war zones existed between tribal territories. For a classic work on the social and political organization of the northern Cheyenne, see K.N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).
 45. *Worcester v. Georgia*, 6 Pet. 515 (1832), 546, referring to the charters.
 46. Britain's claims to the region were transferred to Canada on July 15, 1870: see Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).
 47. See Delia Opekokew, *The First Nations: Indian Government and the Canadian Federation* (Saskatoon, Sask.: Federation of Saskatchewan Indian Nations, 1980). American law supports this conclusion to the extent that it acknowledges that the Indian nations have residual sovereignty, entailing a right of internal self-government: see *Worcester v. Georgia*, 6 Pet. 515 (1832); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1987). In Canada, the Supreme Court in *Simon v. The Queen* [1985], 2 S.C.R. 387, said that Indian treaties are *sui generis* rather than international, but that case involved a treaty in Nova Scotia. The Court has not yet decided whether the Indian nations have a right of self-government.

Kent McNeil is an associate professor of law at Osgoode Hall Law School in Toronto. He is a graduate of Oxford University and a former research director of the University of Saskatchewan Native Law Centre in Saskatoon. For the past 18 years he has specialized in the rights of indigenous peoples, especially land and governance rights, in Canada, Australia, and the United States. He is the author of numerous articles and monographs in this field, as well as a book entitled *Common Law Aboriginal Title*.

